

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

Case Number: 1:12-cv-00257-JB-LFG

LARRY GOLDSTONE,
CLARENCE G. SIMMONS, III
and JANE E. STARRETT,

Defendants.

NOTICE OF SUPPLEMENTAL AUTHORITY

Pursuant to Local Rule of Civil Procedure 7.8(b) and in further opposition to the Motion to Dismiss of Jane Starrett, Plaintiff Securities and Exchange Commission submits this Notice of Supplemental Authorities to raise with the Court a significant decision that has recently come to Plaintiff's attention.

SEC v. Sells, No. C 11-4941 CW, 2012 WL 3242551 (N.D. Cal. Aug. 10, 2012), provides further support for finding that schemes such as that alleged here properly state a cause of action under subsections (a) and (c) of Rule 10b-5. *See* Plaintiff's Surreply to Defendant Jane Starrett's Reply in Support of Motion to Dismiss (Dkt # 63) at 7. In that case, Judge Wilken made it clear that actions supporting a scheme need not be unrelated to any alleged misstatement, finding that the Plaintiff had adequately alleged a scheme despite the fact that the "purpose of Defendants' improper actions may have been to increase Hansen's sales and income figures, which they knew would be reported to the public" *Id.* at *7. In finding the scheme adequately alleged, the court noted that "the deceptive conduct alleged by the SEC goes beyond the making of material

misstatements or omissions.” *Id.* The case is also significant because, as here, the acts taken in furtherance of the scheme included making misstatements to outside auditors. *Id.* at ** 2-3.

Sells rejected an argument based upon *SEC v. Kelly*, 817 F. Supp. 2d 340 (S.D.N.Y.), upon which Ms. Starrett extensively relies. Judge Wilken noted that the *Kelly* court reasoned that imposing liability “for a scheme based upon an alleged false statement, when the defendant did not ‘make’ the statement, would render the rule announced in *Janus* [*Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011),] meaningless.” *Id.* at 6. The *Sells* court explained that “[a]llowing liability for Defendants’ alleged conduct under Rule 10b-5(a) and (c) would not make *Janus* meaningless because *Janus* did not address these sections. . . .” *Id.* at *7.

Dated: September 10, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2012, I filed the foregoing document through the CM/ECF system that will send notification of such filing to all counsel of record.

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